The Constitutional Status of Women in Turkey at a Crossroads: Reflections from Comparison

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Constitutionalism and the Establishment of a Gender Order

Since its foundation, the Turkish Republic took the enhanced status of women to epitomize its promise of modernity. Yet to the extent that women´s equality was even articulated in Turkey, as well as anywhere else in that time, its expression was primarily sought in the public, not in the private, domain. Thus, the 1924 Turkish Constitution explicitly sanctioned primary education – free and compulsory – for both men and women (art. 37), as well as the equal right of men and women to vote and be elected (arts. 10 and 11). Also, a general reference to the principle of equality before the law, without any explicit mention to sex, was included (art. 69). Yet none of these expressions of equality were seen as incompatible with many of the inequalities between men and women explicitly enshrined in the Civil Code – adopted in 1926 and largely drawing from the Swiss Civil Code –, or in the Criminal Code adopted that same year, largely inspired by the Italian code. Both of these codes which came to replace the legality of the Ottoman Empire simply reflected the XIXth century European family ideology, an ideology revolving around the construct of the male breadwinner / female homemaker, which accompanied the establishment of the modern industrialist order. The constitutions of the time simply accepted, rather than challenged, this ideology and the gender order that came with it.

This basically held true for early post-World War II constitutionalism as well. There was, after all, a significant overlap in time between the heyday of the breadwinner family model (in the 1950s and early 1960s, coinciding with a strong post-war pro-natalist movement) and the post-war wave of European constitutionalism, which we take as epitomizing contemporary European constitutionalism. If we look at both the Italian Constitution (1947) and the German Fundamental Law (1949), we find that they both prohibit discrimination on the grounds of sex at the same time as they endorse elements of the dominant family ideology. The German Constitution refers to the duty of the state to protect marriage and the family, but also, specifically mothers (6.1 GBL and 6.4 GBL). Even more explicit is the Italian Constitution, which, additionally, refers to the concept of the family wage (36.1) and to women´s essential family duties which must be respected through adequate working conditions (art. 37). It is therefore not that surprising that the first post-WWII constitution in Turkey, that of 1961, which was largely inspired in the German Basic Law, also banned discrimination on the basis of sex (art. 12), while at the same time referring to the family, as the fundamental unit of the Turkish society, which, like motherhood and childhood, deserved State protection (art. 35). It also contemplated the need to protect women from being employed in jobs unsuited to their sex (art. 43).

This family ideology and, linked to it, this particular constitutional understanding of equality of sexes, was also reinforced in the early case law of the constitutional courts. Thus, in Italy, in the early 1960s' jurisprudence, the Constitutional Court affirmed the husband´s "marital authority" as well as his obligation to provide for his wife.[1] Most infamously, in 1961, the Court upheld a criminal code provision making the wife's adultery a criminal offence, yet qualifying the husband's as such only when it was performed within the household or "notoriously" elsewhere, considering the distinction justified on the basis of the social consensus around the different meanings of men's and women's adultery, as well as on the fact, taken as self-evident, that the wife's adultery constituted a more serious attack to family unity,[2] a doctrine it would abandon just a few years later. Slightly more subtle was the German Federal Constitutional Court, which, although clearly rejecting the idea of woman´s marital subordination, still interpreted the gender equality and the sex antidiscrimination clauses in the German Basic Law (arts. 3.2 and 3.3 GBL) to allow for differentiations based not only on "objective biological" but also on "functional" differences, mostly linked to their expected different family roles, assuming women´s greater dependency on men.[3]

Second Wave Feminism and the Challenge to Women´s Distinct Marital Status and Relegation to the Family

If we look for the meaningful questioning of the separate spheres ideology, the first true breakthrough moment must be located around the 1970s, and is directly related to second-wave feminism's challenge to women's relegation to the private sphere. It was then that Courts started to read into their constitutions the need to overcome women's distinct marital status, and expand women's role beyond the family, focusing more and more on ensuring women's market equality. The Italian Constitutional Court, for instance, soon departed from its precedent justifying women´s subordinated position in the family,[4] and the German Federal Constitutional Court also started rejecting differential treatments that rested on the assumption of women´s greater housework.[5] Not surprisingly, it was in the 70s that major civil code reforms seeking gender equality were passed in both these countries. In other words, separate but equal was no longer taken to be a valid expression of constitutional sex equality. This affirmation of formal equality also meant challenging protectionist measures that benefited women only in appearance, such as norms and practices banning women from certain forms of employment or granting women incentives to remain outside that "harsh" world of paid employment.

At the same time, in Europe, formal equality did not exhaust the constitutional ideal of gender equality. Instead, starting in the 1980s, overcoming disadvantage and ensuring *equal opportunities* in employment became the primary goal of a substantive equality model reflective of Europe's unique constitutional synthesis, combining elements of the liberal and the welfare state traditions, a process reinforced by the evolution of EU antidiscrimination law. Also, Europe´s constitutional tradition, unlike others, has remained loyal to the need to specifically protect the family and motherhood, and this has entailed the accommodation of women´s sex-specific forms of inhabiting the labor market by reconciling family duties and paid employment, for instance, by occupying most of the part-time positions. In all of this, the boundaries between what constitute legitimate protections (think of mandatory maternity leaves) and paternalistic protectionism is not always clear, especially because no matter how well intended, any form of protection that singles out women can always translate itself into discriminatory practices on the part of employers. Yet, at least one premise nowadays goes now unchallenged, namely that the goal of substantive equality measures must be to help women overcome the obstacles that they find in the employment domain (or any other domain from which they were secularly excluded), not to keep them "protected" from those domains, and devoted to their unpaid reproductive and care role functions inside of the family according to traditional gender stereotypes.

Gender Equality under the Turkish Constitution and the Constitutional Court´s Erratic Jurisprudence

The 1982 Turkish Constitution has now been amended several times (in 2001, 2004 and 2010), sometimes under the influence of the prospect of EU accession. After these amendments, Turkey finds itself in a crossroads regarding women´s constitutional status, and, more broadly speaking, the constitutional gender order. The Constitution contains an equality provision (art. 10), which makes explicit the commitment to substantive equality, including the possibility to adopt affirmative action measures. Also, art. 41 mentions the family as the foundation of Turkish society, but also, tellingly, was amended in 2001 to include the qualification of the principle of equality between the spouses which must reign in the family. In the legislative domain, major sex egalitarian reforms have also taken place since the 2000, including that of the Civil Code in 2001 and of the Criminal Code in 2004. Yet still reflective of the old and implicitly paternalistic gender order is art. 50, which suggests that there are forms of employment to which one may not be suited because of one's sex, and mentions women (and not just pregnancy or any other narrowly defined biological sex-specificity), together with minors and physically and mentally disabled, as in need of special protections and working conditions.

More importantly, sex inequalities are still present in the Turkish legal order and the Turkish Constitutional Court has thus far had an erratic jurisprudence, sometimes prioritizing the need to overcome gender stereotypes and hierarchies, sometimes justifying unequal treatment and perpetuating such gender stereotypes.[6] In particular, in some of its case law, the Court seems to confuse the modern notion of affirmative actions/positive measures that help women achieve equal opportunities as they enter the domains from which they were previously excluded, with that of traditional protectionist measures, which, far from challenging women´s confinement to the domain of private-family-unpaid care labor, encourage such confinement or, at best, offer compensation for some of the vulnerabilities and dependencies it provokes without challenging its patriarchal premises.

A quick look at some of the case law of the Turkish Constitutional Court shows the existing tensions between what we could call the emancipatory and the patriarchal/protectionist paradigms, of which only the former affirms the central value attached to women´s free self determination and full agency. The patriarchal/protectionist paradigm can be detected in several early decisions, such as a 1963 decision validating a provision of the Turkish Civil Service Code which legitimized the exclusion of women from jobs considered unsuitable to them,[7] or a 1989 decision validating a Civil Code provision recognizing the husband´s leadership in the family, calling on the value of family unity and Turkish tradition.[8] Signs of the emancipatory paradigm can be found starting in the nineties when the Court was responsible for triggering some egalitarian reforms. For instance, in 1990, the Court struck down a provision in the Civil Code providing for the husband's control over women's professional or artistic activities referring to equality in men and women's right and responsibility to work (under art. 49 in the Constitution), and mentioning the Universal Declaration of Human Rights and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[9] Also, in 1996, after much resistance, the Court finally struck down the male privilege in the adultery norm originally inherited from the Italian Civil Code, acknowledging that there is no difference between husband and wife with regard to loyalty in marriage.[10]

Yet the Court's doctrinal path, especially after the turn of the century, does not seem to be one of linear progression. Instead, it shows a Court that is increasingly divided regarding the meaning of the constitutional doctrine of sex equality and the extent to which the traditional understanding of the family, with its gender normative roles, should limit or shape such doctrine. Thus, in 2008, the Court validated a norm in the Turkish Labor Act contemplating the possibility of voluntary retirement after marriage for women only, calling on women´s responsibility in society and family life (interpreting art. 10 in light of arts. 41 and 50),[11] in spite of the vocal dissent of two justices, including the at the time only woman on the Court, Justice Fulya Kantarcioğlu, noting that the provision amounted to an incentive for women to stay at home, and disregarded art. 41's mention of equality between the spouses by reflecting traditional gender roles.

Equally worrisome is the fact that in as late as 2011, the Court validated the norm in the Civil Code on the basis of which women have to add the husband's family name to their own, calling on the notion of family unity and integrity as the foundation of Turkish society, and on an understanding of the family as capturing and conveying the "distinctive characteristics of the nation, values, beliefs and thought patterns".[12] Tellingly, the judgment came even after the Turkish family names rule had been condemned by the ECHR as violating art. 8 (respect for private and family life) in relation with art. 14 (prohibition of discrimination) of the European Convention on Human Rights,[13] a judgment the Court interpreted as binding only with regard to the individual plaintiff. A vociferous dissent by several justices accompanies the 2011 Constitutional Court decision, denouncing not only Turkey's failure to live up to its international obligations, but also the infringement of several constitutional rights including the prohibition of discrimination on the grounds of sex by a norm which the dissent saw as perpetuating a tradition which expresses men's primary and women's secondary role in the family.[14] Since, Turkey has been condemned three more times by the ECHR,[15] and finally in 2013, in response to an individual complaints procedure, the Court has departed from its precedent, recognizing that the applicants' constitutional rights, interpreted in the light of the case law of the ECHR, have been violated. Yet, even in 2013, the decision was held to be applicable only to the individual case at stake. The problematic norm is still on the books. Also, conspicuously, the sex equality provision in art. 10, which the dissent had relied on in the previous decision, is not deemed relevant to the Court´s reasoning (instead, the decision is structured around Turkey's international obligations under art. 90, as well as around art. 17's right to bodily and spiritual existence).

Prospects for the Future?

It is not clear what direction the Turkish Court will take in the future. One unpromising fact is that the only female judge still on the Court, who has on occasions defended the need to subvert traditional gender roles, is about to retire. The system of appointing the judges on the constitutional court was amended to allow for a greater presidential role and the current president has publicly defended the vision in which the primary role of Turkish women is that of being mothers. In the meantime, interesting constitutional evolutions are taking place in the area of gender roles in other Western European countries, and the Turkish Court may want to keep an eye open for such evolutions, especially as it struggles to identify a way to live up to its constitutional commitment to the protection of the family, without limiting women´s autonomy to the role of motherhood.

Indeed, with European countries in the lead, there is an ongoing agenda to change the terms in which human reproduction and care are conceptualized and accommodated. This move represents an attempt to go beyond the traditional European model (basically seeking to protect pregnant women and working mothers), and aims at ensuring work/family balance for all, as well as the sharing of care responsibilities between men and women. In policy terms, this movement is most clearly expressed in the (as of yet still modest) adoption of paternity leaves, longer gender neutral parental leaves, as well as specific measures to encourage men to take such leaves, including by making paternal leaves non-transferable.

Constitutionally speaking, this movement relies on a reassessment and strengthening of the figure of fatherhood, as well as on the piercing of the veil of family privacy and State neutrality regarding the organization of care work inside the family. Under recent scrutiny have come those norms that still single out motherhood, as opposed to fatherhood, in relation to parenting and beyond what is strictly biologically determined. Increasingly challenged are also those gender biases which have remained deeply embedded in gender neutral norms in many areas of the law shaping men and women's roles and expectations. A look at recent jurisprudence by the Italian Constitutional Court granting fatherhood leaves to fathers challenging norms that only granted them to mothers may be inspiring (even though this jurisprudence still refers to the father's role only in subsidiary terms).[16] More theoretically groundbreaking is the recent jurisprudence of the German Federal Constitutional Court, which, deviating from pre-established doctrine of family privacy, is coming to terms with the fact that the distribution of care roles within the family is also a constitutional concern under the sex equality clause, when analyzing formally sex neutral legislation with impact on gender roles in as varied domains as post-divorce spousal support obligations,[17] or parental leave allowances.[18] In all of these domains, the "traditional family roles" exception to sex equality provisions in the constitution seems to be caving in, even while the central importance of reproduction and care is retained.

In the end then, the Turkish Court seems confronted to two alternatives. It may decide to regress and affirm the protectionist/patriarchal model, gradually leaving aside the concept of gender equality and replacing it by some notion of "gender equity" which allows it to endorse broad as opposed to narrow, functional as opposed to strictly biological, exceptions to equal treatment. It could do so by insisting on the traditional and central importance of the family for Turkish society and the glorification of motherhood. Presently, this seems to be the preferred governmental line. But the Court may also challenge this line and let the seeds of the emancipatory model it has occasionally endorsed fully flourish by affirming gender equality, the subversion of gender stereotypes and the central importance of women's autonomy. The Court could draw inspiration from comparison in articulating the view that this emancipatory model does not need to undermine the centrality of the family in Turkish society: it simply requires to accept that motherhood must be voluntary as well as the plurality of existing family forms and the premise that the constitutionally sanctioned family model must be sex egalitarian. In the past the Constitutional Court has proven willing and able to set strong constitutional limits to executive and presidential acts, including in matters pertaining to gender equality. It remains to be seen whether this will be the case at this crucial venture. It is the understanding of Turkish women's citizenship that is at stake. Nothing more, nothing less.

I would like to thank Daniela Alaattinoğlu for her research assistance in the elaboration of this piece. Its writing took place during a visit to Istanbul, kindly hosted by the Law School of the Koç University, allowing me to gather relevant knowledge and meet people to share my impressions with, for which I want to thank Dean Bertil Oder.

[1] See Sentenza 144/1967, 12 December 1967.

[2] See Sentenza No. 64/1961 (28 November 1961).

[3] See BVerfGE 17, 1 (24 July 1963).

[4] See Sentenze No. 126/1968 (16 December 1968); 127/1968 (16 December 1968) and 147/1969 (27 November 1969).

[5] See BVerfGE 52, 369 (13 November 1979).

[6] See also Hilal Elver, "Gender Equality from a Constitutional Perspective: the Case of Turkey", in *The Gender*

of Constitutional Jurisprudence (Baines, B. and Rubio-Marín, R.) Cambridge University Press, 278-305.

[7] E. 1963/148, K. 1963/256, T. 23.10. 1963, JCC 1963 at 459.

[8] E. 1989/7 K. 1989/23, JCC 1991, at 55-73.

[9] E. 1990/30, K. 1990/31, T. 29II, 1990, JCC 1991 27/I at 249-271.

[10] E. 1996/15, K. 1996/34 (1996), 7.12 *Official Gazette* No. 22860 at 249-51.

[11] E. 2006/156, K. 2008/125, T. 19.6.2008, OG 26.11 2008-27066.

[12] E. 2009/85, K. 2011/49, T. 10.3. 2011, OG 21.10.2011-28091.

[13] See *Ünal Tekeli v. Turkey*, ECtHR, application no. 29865/96, judgment 16 November 1950, ETS 5.

[14] E. 2009/85, K. 2011/49, T. 10.3. 2011, *Official Gazette* 21.10.2011-28091.

[16] See Sentenze n. 341/1991; n. 179/1993 and n. 150/1994.

[17] See BVerfGE 105, 1(5 February 2002).

[18] See BVerfG 1 BvR 2712/09 (6 June 2011) and BVerfG, 1 BvR 1853/11 (9 November 2011).

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[1] See Sentenza 144/1967, 12 December 1967.

[2] See Sentenza No. 64/1961 (28 November 1961).

[3] See BVerfGE 17, 1 (24 July 1963).

[4] See Sentenze No. 126/1968 (16 December 1968); 127/1968 (16 December 1968) and 147/1969 (27 November 1969).

[5] See BVerfGE 52, 369 (13 November 1979).

[6] See also Hilal Elver, "Gender Equality from a Constitutional Perspective: the Case of Turkey", in *The Gender of Constitutional Jurisprudence* (Baines, B. and Rubio-Marín, R.) Cambridge University Press, 278-305.

[7] E. 1963/148, K. 1963/256, T. 23.10. 1963, JCC 1963 at 459.

[8] E. 1989/7 K. 1989/23, JCC 1991, at 55-73.

[9] E. 1990/30, K. 1990/31, T. 29II, 1990, JCC 1991 27/I at 249-271.

[10] E. 1996/15, K. 1996/34 (1996), 7.12 *Official Gazette* No. 22860 at 249-51.

[11] E. 2006/156, K. 2008/125, T. 19.6.2008, OG 26.11 2008-27066.

[12] E. 2009/85, K. 2011/49, T. 10.3. 2011, OG 21.10.2011-28091.

[13] See *Ünal Tekeli v. Turkey*, ECtHR, application no. 29865/96, judgment 16 November 1950, ETS 5.

[14] E. 2009/85, K. 2011/49, T. 10.3. 2011, *Official Gazette* 21.10.2011-28091.

[16] See Sentenze n. 341/1991; n. 179/1993 and n. 150/1994.

[17] See BVerfGE 105, 1(5 February 2002).

[18] See BVerfG 1 BvR 2712/09 (6 June 2011) and BVerfG, 1 BvR 1853/11 (9 November 2011).

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